

LISA A. RASMUSSEN, ESQ.
Nevada Bar No. 007491
California Bar No. 207026
LAW OFFICE OF LISA RASMUSSEN, ESQ.
616 South 8th Street
Las Vegas, NV 89101
Tel. (702) 471-6565
Fax. (702) 471-6540
Lisa@LRasmussenLaw.com
Local Counsel for Jessica Gaona, Objector

EDWARD F. SIEGEL
Law Office of Edward F. Siegel
27600 Chagrin Blvd.
Cleveland, OH 44122
Tel. (216) 831-3424
Fax. (216) 831-6584
efiegel@efs-law.com
Counsel for Deborah Maddox, Objector

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

In Re:
WAL-MART Wage and Hour
Employment Practices Litigation

THIS DOCUMENT RELATES TO:
All Cases.

MDL - 1735

02:06-cv-225 PMP (PAL)

**APPELLANTS JESSICA GAONA
AND DEBORAH MADDOX' JOINT
RESPONSE TO CLASS COUNSEL'S
MOTION FOR BOND FOR APPEAL
(C.R. # 541, 542, 543, 544, 545, 546 and
549, 550, 551, 552, 553, 554)**

COME NOW Objectors JESSICA GAONA, by and through her counsel, Lisa A. Rasmussen, Esq., and Christopher A. Bandas, Esq.; and DEBORAH MADDOX, by and through her counsel, Edward F. Siegel Esq.; and hereby submit their Joint Response to Class Counsel's Motions for Bond For Appeal and their related document documents. (*See* C.R. #'s 541, 542, 543, 544, 545 and 546 as to Jessica Gaona; and C.R. #'s 549, 550, 551, 552, 553 and 554 as to Deborah Maddox.)

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RESPONSE IN OPPOSITION TO WAL-MART'S MOTION

Class Counsel for the Plaintiffs seeks an appeal bond from Objectors Jessica Gaona and Deborah Maddox under Rule 7 FRAP. The Motion is essentially duplicative of the request made by Plaintiff Nancy Hall. The parties herein have already filed their Response to Plaintiff Nancy Hall's Motion, incorporated herein by this reference. (*See* C.R.#556.) Specifically, class counsel requests bond in the amount of approximately \$608,000 from Gaona and bond in the amount of approximately \$610,000 from Maddox. (*See* C.R. #542 at page 1, and #550 at page 1.) This, this response in opposition will simply repeat the arguments in opposition to Class Plaintiffs. As explained in Response to Class Plaintiff Nancy Hall's Motion for Bond, \$715,000 or \$990,000 sought by class counsel are not for costs. Class Plaintiffs' request here is essentially duplicative, though the amounts vary somewhat. Nevertheless, the claimed bond costs items are not bondable on appeal under the facts of this case. Under Rule 7 FRAP, a bond cannot include attorneys' fees or administrative costs. Objectors/Appellants' objections to the settlement and Class Counsel's attorneys' fees, and their appeal from the order overruling their objections to the settlement and class counsel's fees, are facially not frivolous and their appeal is highly unlikely to be declared so by the appellate panel.

It is clear that Class Counsel is seeking bonds in excess of \$600,000 in an attempt to stifle objectors' appeal from this court's approval of the settlement and their attorneys' fees. That is not a proper use of the rules relating to bonding, and the Court should not allow it pursuant to Rule 7 FRAP. Class Plaintiffs' are entitled to a bond for the actual costs explicitly taxable pursuant to in Rule 39 FRAP, but not anything more.

A. Neither the Objections to Attorney Fees Nor the Appeals Are Frivolous

The overarching theme of Class Plaintiffs' request for the bonds in this case is that Objectors/Appellants' objection to the settlement and class counsel's fees are frivolous, and that Objectors/Appellants counsel are "professional objectors"¹ who pursue objections for improper purposes.

¹ Although class counsel may prefer pro se objectors, or objectors counsel with no experience in class actions, due process, assures objectors the right to professional representation.

1 First, an appeal is frivolous if "the result is obvious or if the claims of error are wholly without
2 merit." *DeWitt v. Western Pacific Railroad Co.*, 719 F.2d 1448, 1451 (9th Cir. 1983). The fact that
3 there is a body of federal jurisprudence regarding attorney's fees shows reasonable people often differ
4 on this issue. 28 U.S.C. Section 1927, which might support a bond for "vexatious litigation conduct,"
5 is inapplicable to this appeal as it requires "bad faith or intentional misconduct by counsel." Although
6 the imposition of attorney's fees on appeal as a sanction is allowed under Rule 38, it is only available
7 after the appeals court finds the appeal frivolous, and only upon further motion and hearing. 10 Wright,
8 Miller & Kane, Federal Practice & Procedure, §2675; 2675.2 (2001); see also *Azizian v. Federated*
9 *Department Stores, Inc.*, 499 F.3d 950, 960 (9th Cir. 2007).

10 It is well established that whether an appeal is frivolous is solely within the purview of the
11 appellate court, not the district court. *Vaughn v. American Honda Motor Co., Inc.*, 507 F.3d 295, 299
12 (5th Cir. 2007); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 407 (1990); *In re American President*
13 *Lines, Inc.*, 779 F.2d 714, 717 (D.C. Cir 1985). Only the appellate court has the authority to impose
14 sanctions for a frivolous appeal, *Aizian*, 499 F.3d at 960; *In re Vasseli*, 5 F.3d 351, 353 (9th Cir 1993)
15 citing *In re American President Lines, Inc.* 779 F.2d 714, 717 (D.C. Cir. 1985).

16 In the case of *Azizian v. Federated Department Stores, Inc.*, the 9th Circuit considered the
17 question of under what circumstances a district court may require an appellant to include appellate
18 attorney's fees in an appeal bond. See *Azizian*, 499 F.3d 950. The *Azizian* court determined that a
19 district court may require an appellant to secure appellate attorney's fees in the appeal bond pursuant
20 to Rule 7 only if an applicable fee shifting statute includes attorney's fees in its definition of recoverable
21 costs. *Id.* at 953. In *Azizian*, the district court had ordered appellants to post a \$42,000 appeal bond,
22 representing \$2,000 in appellate costs under Rule 39 and \$40,000 in appellate attorney's fees. *Id.* at 954.
23 the district court rationalized its inclusion of attorneys fees in the appeal bond by concluding that the
24 Court of Appeal was likely to find the appeal frivolous. *Id.* Appellants tendered the \$2,000 of the bond
25 allocated to costs under Rule 39, but not the \$40,000 allocated to attorney's fees. *Id.* The 9th Circuit
26 eventually found that the appeal should not be dismissed on the merits because appellants had failed
27 to post the full bond required by the district court. *Id.* at 954. In discussing the district court's
28 determination that the Court of Appeal would find the appeal frivolous and therefore award attorney's

1 fees as a sanction under Rule 38, the 9th Circuit stated that "even if we were to conclude that [the
2 appellant's] appeal was frivolous, however, we would reverse the district court's inclusion of appellate
3 attorney's fees on that basis." *Id.* at 960. The 9th Circuit held that the district court's inclusion of
4 attorney's fees in the bond on the grounds that the appeal was likely frivolous was improper for three
5 reasons. *Id.* First, because an award of attorney's fees for a frivolous appeal under Rule 38 is very
6 unusual, and it would be difficult for the district court to gauge whether such an award would be likely.
7 *Id.* Second, if the potentially large sums possible under Rule 38 were included in Rule 7 bonds, the
8 effect would be to chill appeals. *Id.* Third, Rule 38 authorizes the award of attorney's fees as a sanction
9 for improper conduct on appeal, and only the court of appeals may order the sanction of appellate
10 attorney's fees. *Id.* The 9th Circuit concluded that "whether, or how, to deter frivolous appeals is best
11 left to the courts of appeals..." *Id.* at 961. Therefore, there is simply no provision for a district court to
12 make an advance determination that an appeal violates Rule 38, much less authority for imposing a
13 bond to include the anticipated damages and sanctions that the circuit court may ultimately determine.

14 **B. Bondable Costs Do Not Include Attorneys' Fees**

15 Apart from their claim that frivolity of the appeal supports a bond for attorneys' fees, Class
16 Plaintiffs suggests that this Court has the authority to include prospective attorneys' fees as items of
17 Rule 7 FRAP costs. In fact, the majority rule among circuit courts, endorsed by the Second, Sixth,
18 Ninth and Eleventh Circuits, is that a district court may include attorneys' fees in a Rule 7 Bond, but
19 **only if** those attorney's fees would be considered recoverable costs under an applicable fee shifting
20 statute. See *Azizian*, 499 F.3d at 958.

21 This Court now has the opportunity to clarify and update its rule regarding Rule 7 bond orders
22 issued by district courts to bring it in line with the majority view: that attorney's fees may only be
23 included in a Rule 7 bond if the underlying "prevailing party" fee shifting provision of a statute includes
24 attorney's fees as recoverable. This Court also has the opportunity to firmly establish appellate court
25 precedence in the determination of whether an appeal is frivolous, in concert with at least three other
26 circuits by holding that the appellate courts are the best forum in which to determine whether an appeal
27 is frivolous, and that district courts have no authority to make peremptory determinations of
28

1 frivolousness, nor to base bond orders on those predictions. *See Azizian*, 499 F.3d at 960 (9th Cir.
2 2007).

3
4 **CONCLUSION**

5 As set forth above, there is no legal or factual support for the imposition of a Rule 7 bond that
6 exceeds the actual costs and it is respectfully requested that this Court issue an Order denying Class
7 Plaintiffs' Motion for Bond for Appeal, or, in the alternative, limiting any bond that this Court will
8 consider to only the reasonable actual/projected costs permitted.

9 Respectfully submitted and dated this 8th day of January, 2010.

10 **LAW OFFICE OF LISA RASMUSSEN,**

11 */s/ Lisa A. Rasmussen*

12

LISA A. RASMUSSEN, ESQ.

13 Nevada Bar No. 7491

Local Counsel for Jessica Gaona, Objector

14 **BANDAS LAW FIRM, P.C.,**

15 */s/ Christopher A. Bandas*

16

CHRISTOPHER A. BANDAS, ESQ.

17 500 N. Shoreline Blvd., Suite 1020

Corpus Christi, TX 78471

18 Tel. (361) 698-5200

Fax. (361) 698-5222

Cbandas@bandaslawfirm.com

19 Counsel for Jessica Gaona, Objector

20 **LAW OFFICE OF EDWARD F. SIEGEL**

21 */s/ Edward F. Siegel*

22

EDWARD F. SIEGEL, ESQ.

23 27600 Chagrin Blvd.

Cleveland, OH 44122

24 Telephone: (216) 831-3424

Facsimile: (216) 831-6584

efiegel@efs-law.com

25 Counsel for Deborah Maddox, Objector

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellants' Jessica Lynn Gaona and Deborah Maddox' Joint Response to Plaintiffs' Motion for Bond has been served via CM/ECF upon the following persons, on this 8th day of January, 2010:

Co-Lead Class Counsel

Robert J. Bonsignore, Esq. rbonsignore@bandblaw.net

Co-Lead Class Counsel

Carolyn Beasley Burton, Esq. cbeasley@beasleylawgroup.biz
& Counsel for Plaintiff Nancy Hall

Wal-Mart Class Counsel

Naomi Beer, Esq. beern@gtlaw.com

Adriana Contartese
adriana999@juno.com

Ann Miller
am@attorneyannmiller.com

Arthur Y. Park
apark@ppyrlaw.com

Barbara A. Petrus
bpetrus@goodsill.com,

Barry M. Klayman
bklayman@cozen.com

Bernard J. Bobber
bbobber@foley.com

Bradd N. Siegel
bsiegel@porterwright.com

Bradley D. Bonner
brad@bonnerstinsonpc.net

Brendan V. Johnson
brendan@jhmmj.com

Brian Duffy
duffy@gtlaw.com

Brian C. Buescher
Brian.Buescher@kutakrock.com

Brian W Boschee
bboschee@nevadafirm.com

Carol P LaPlant
carollaplant@msn.com

Carolyn K. Gugelyk
cgugelyk@goodsill.com

Christopher P. Welsh
cwelsh@welsh-law.com

Christopher R. Hedican
chedican@bairdholm.com,

Craig O. Asbill
casbill@carolinalaw.com

Craig W. Hillwig
chillwig@koh Swift.com

1 2	Cynthia K. Smith cks@montanalaw.com	Daniel A. Kaplan dkaplan@foley.com	Daniel D Ambrose daniel@ambroselawyers.com
3 4	Daniel E. Rausher danrausher@yahoo.com	Daniel J. Mitchell dmitchell@bernsteinshur.com	David L. Young youngd@lanepowell.com
5 6	Deena Jo Schneider dschneider@schnader.com	Dirk A Ravenholt lawdirk@aol.com	Don V. Huynh dhuynh@ppyrlaw.com
7 8	Donald S Goldbloom goldbloomlaw@verizon.net	Edmund K. Saffery esaffery@goodsill.com	Edward F Siegel efsiegel@efs-law.com
9 10	Ellen E. Boshkoff ellen.boshkoff@bakerd.com	Ellen T. Noteware enoteware@bm.net	Eric J Pelton epelton@kohp.com
11 12	F. Thomas Edwards tedwards@nevadafirm.com	Franklin D Azar kingm@fdazar.com	Fred Schultz fschultz@kiva.net
13 14	Gary R. Scott gscott@hirstapplegate.com	Gary S. Nitsche gnitsche@attys4u.com	George Cournty French cfrench@fpflaw.com
15 16	Gerald L. Bader, Jr. gbader@bader-associates.com	Glen W. Neeley glneeley@yahoo.com	Gregory F. Greiner greg_greiner@msn.com
17 18	Ivy L Frignoca ifrignoca@lambertcoffin.com	J. Thomas Henretta jth@henrettalaw.com	James E Whitmire, III jwhitmire@nevadafirm.com
19 20	James F Bennett jbennett@dowdbennett.com	James M Mullis , Jr dholloway@mullislawfirm.com	James R. Welsh jwelsh@welsh-law.com
21 22	Jay A. Urban jurban@wisconsininjury.com	Jeffrey S. Beck jeffrey.beck@bakerd.com	Jeremy Cave cavej@fdazar.com
23 24	Jill P. Telfer jilltelfer@yahoo.com	Jim Odell Stuckey , II jstuckey@littler.com	John Pentz Clasaxn@earthlink.net
25 26			
27 28			

John C. McLaren
john@ppyrlaw.com

John J Rausch
rauschlawfirm@dybb.com

Joseph C. Kohn
jkohn@kohnsnswift.com

Kathleen W. Toth
ktoth@mc2b.com

Kent Hirsch
kent@hirschlawfirm.com

Kurt D. Williams
kwilliams@bowse-law.com

Lanny H. Darr , II
ldarr@sbkdlaw.com

Laurence William Stinson
laurence@bonnerstinsonpc.net

Laurent J. Remillard , Jr
lremillard@ppyrlaw.com

Lawrence J Sorohan , II
lsorohan@laborlawyers.com

Lee Bruner
lee@prrlaw.com

Lindsay Ann Eckes
leckes@hirstapplegate.com

Marcia A. Washkuhn
Marcia.Washkuhn@kutarock.com

Maria B Glorioso
maria@gtorts.com

Mark A Tate
mtate@cartertatelaw.com

Mark C. Choate
markcchoate@yahoo.com

Mary K. Schug
schugm@lanepowell.com

Matthew T. Tobin
matt@sdtrustco.com

Melissa Carol Hinton
mhinton@dehs.com

Michael Reiss
mikereiss@dwt.com

Michael J. Killeen
mikekilleen@dwt.com

Mike J. Miller
mjm@solberglaw.com

Nathan R. Long
nate@echohawk.com

Pamela R. Mullis
prmullis@mullislawfirm.com

Paul Blankenstein
pblankenstein@gibsondunn.com

Paul Alexis Del Aguila
delaguilap@gtlaw.com

Paul C. EchoHawk
paul@echohawk.com

R. Deryl Edwards , Jr
rde417@hotmail.com

Richard P Batesky , Jr
rpbatesky@aol.com

Robert Carl Jarosh
rjarosh@hirstapplegate.com

Robert K. McCalla
rmccalla@laborlawyers.com

Robert W Mills
rwm@millslawfirm.com

Roberto Antonio Lange
rlange@dehs.com

Rodney P. Bridgers
Bridgersr@fdazar.com

Ronald Kilgard
rkilgard@kellerrohrback.com

Rudy A. Englund
englundr@lanepowell.com

Sammi V. Anderson
sanderson@mc2b.com

Samuel K. Rudman
srudman@lambertcoffin.com

Stacey E. Tjon
set@solberglaw.com

Stephen M Smith
ssmith@braininjurylawcenter.com

Susan Brunick Simons
ssimons@dehs.com

Thomas A Nicholas , III
tnicholas@hirstapplegate.com

Thomas Henry Johnson
thjatty@windstream.net

Thomas J. Kenny
thomas.kenny@kutakrock.com

Todd S. Collins
tcollins@bm.net

Tonya L Melnichenko
melnichenkot@fdazar.com

Troy N Giatras
troy@thewvlawfirm.com

Vincent J Glorioso , III
trey@gtorts.com

Vincent J Glorioso , Jr
lawclerk@gtorts.com

Wayne D. Parsons
mdodge@alohano.com

William J. Kilberg
wkilberg@gibsondunn.com

/s/ Lisa A. Rasmussen

Lisa A. Rasmussen, Esq.